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No. 71-81

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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UNITED STATES OF AMERICA, PETITIONER

*v.*

LOARN ANTHONY BISWELL

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit reversing a conviction for dealing in firearms without payment of the special occupational tax.

## OPINION BELOW

The opinion of the court of appeals (Appendix A, *infra*) is not yet reported.

## JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on May 18, 1971. On June 9, 1971, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including



438-431

July 17, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the inspection provisions of the Gun Control Act of 1968 (18 U.S.C. (Supp. V) 923(g)) violate the Fourth Amendment insofar as they authorize agents of the Internal Revenue Service to inspect without a warrant during business hours firearms on the premises of a licensed dealer in firearms.

2. Whether the inspection and seizure in this case were reasonable.

## STATUTE INVOLVED

18 U.S.C. 923(g) provides in pertinent part:

> * * * The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer or collector at such premises. * * *

## STATEMENT

After a trial by jury in the United States District Court for the District of New Mexico, respondent was convicted of dealing in firearms, as defined in 26 U.S.C. (Supp. V) 5845, without having paid the special occupational tax required by 26 U.S.C. (Supp.

V) 5801. He was sentenced to imprisonment for a period of two years.

The evidence showed that at about 3:10 p.m. on February 4, 1970 (III Tr. 7),[1] special investigator Hupp of the Alcohol, Tobacco and Firearms Division of the Treasury Department, accompanied by a local police officer, made a routine visit to respondent's licensed pawnshop in Hobbs, New Mexico. After inspecting respondent's records, Hupp asked to see the firearms. When respondent inquired if he had a search warrant, Hupp replied that licensed premises were required to be open to inspection during normal business hours. At respondent's request, Hupp showed him a copy of the statute (18 U.S.C. 923(g)), which so provides. Respondent, a former policeman, read it and said "if that is the law, I guess it is all right" (I Tr. 121, 101; III Tr. 3–5).

Hupp thereupon entered the storage room and found two fully operable sawed-off rifles, which had been pawned to respondent (I Tr. 67, 77, 84–92). Although he had a federal license to deal in sporting rifles and other similar weapons, respondent was not licensed to deal in sawed-off rifles; nor were the two weapons registered (I Tr. 92–93; II Tr. 140, 149). These weapons were introduced into evidence at the trial.

In reversing respondent's conviction, the court of appeals ruled that he had not consented to the entry, and that 18 U.S.C. (Supp. V) 923(g) violated the

[1] The transcript, which we are lodging with the Clerk, consists of three volumes. Volumes I and II are the consecutively paginated transcript of trial; volume III is the separately paginated record of the hearing on pretrial motions.

Fourth Amendment insofar as it authorizes entry and inspection without a warrant. The court held that since the weapons were improperly seized, their introduction at trial was reversible error.

## REASONS FOR GRANTING THE WRIT

The decision below, if permitted to stand, would seriously impair effective enforcement of the comprehensive federal gun licensing and registration program enacted by Congress. The court of appeals' decision was, in our view, not required by the Fourth Amendment standard of reasonableness; on the contrary, the decision is inconsistent with the rationale of this Court's recent decision in *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, which dealt with closely similar Fourth Amendment issues.

1. Title I of the Gun Control Act of 1968 establishes a licensing program which authorizes routine warrantless inspections of the business premises of a licensed dealer in firearms. This inspection authority is necessary if the danger from the misuse of firearms is to be subject to meaningful government control.

An essential feature of the federal program is that it enables law enforcement authorities expeditiously to trace firearms used in criminal activity.[2] There are approximately 138,000 licensees presently registered under the Act, and there are fewer than 1,500 special investigators of the Alcohol, Tobacco and Firearms Division available to inspect the premises of these li-

[2] The firearms used in the recent killing of a California judge and other persons were traced to their purchaser through records required to be maintained by licensees.

censees. These manpower limitations are compounded by the circumstances that many of the licensees are located in rural areas[3] and the weapons are easily movable. Implementation of a prompt and meaningful inspection program would therefore be seriously hindered if a warrant procedure were required. Accordingly, the statute authorizes non-warrant inspections of carefully circumscribed scope—inspections only of particularized items on the dealer's premises during business hours. This statutory authorization is thus both important to effectuation of the statutory scheme and narrowly drawn so as not to dilute the reasonableness standard of the Fourth Amendment. See *Terry* v. *Ohio*, 392 U.S. 1, 9.

2. Nothing in recent decisions of this Court calls for invalidation of this statutory provision. Indeed, *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, supports our position here.

That case involved the validity of an inspection statute covering business premises licensed to sell intoxicating liquor. The Court in *Colonnade* agreed with the government's basic constitutional contention that Congress "has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand", and that this may entail a non-warrant procedure (397 U.S. at 76).[4] The ruling against the government in *Colonnade* turned upon a

[3] In the present case, for example, it would have been necessary to go to Carlsbad, New Mexico, at the far end of the next county, in order to locate a magistrate (II Tr. 141).

[4] The Court further found inapplicable the holding in *See* v. *City of Seattle*, 387 U.S. 541, that the Fourth Amendment barred criminal prosecution of one who has refused entry on

narrow question of statutory interpretation (397 U.S. at 74). The Court concluded that Congress there had not authorized *forcible* entries without a warrant, but had intended enforcement to be achieved "by making it an offense for a licensee to refuse admission to the inspector" (397 U.S. at 77). Thus, far from concluding that the licensee in *Colonnade* was justified in refusing to permit inspection of his premises without a warrant, this Court held that the licensee's refusal to permit the inspection was unjustified but that the government's exclusive remedy for that refusal was criminal prosecution rather than forcible entry.[5] In the present case, there was no forcible entry (see Statement, *supra*), and the seizure and forfeiture of firearms or ammunition possessed in violation of the Act are specifically authorized by Congress. 18 U.S.C. (Supp. V) 924(d).

3. Accordingly, the present case differs significantly from *Bumper* v. *North Carolina*, 391 U.S. 543, on

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commercial premises to administrative authorities acting without warrant seeking to inspect under a local fire code. As the Court pointed out, *See* had reserved decision of the validity of warrantless inspection under "licensing programs which require inspections prior to operating a business or marketing a product." Compare 387 U.S. at 545–546 with 397 U.S. at 76–77.

The ruling in *Camara* v. *Municipal Court*, 387 U.S. 523—that the Fourth Amendment bars prosecution of one who has refused to allow a warrantless code-enforcement inspection of his personal residence—was also improperly relied upon below. It was a companion case to *See* and did not purport to deal with the kind of warrantless inspection permitted under the statutory scheme involved in the instant case. See 387 U.S. at 533.

[5] The Court emphasized in *Colonnade* that this country's traditions "are strongly opposed to using force without definite authority to break down doors" (397 U.S. at 77).

which the court below also relied. In *Bumper* consent to a search without a warrant had been obtained by coercion [6] in a situation in which a warrant was required in the absence of valid consent. Here, Congress has reasonably authorized a system of limited inspections without a warrant. It was therefore entirely proper for the officers to point to the statute to inform the licensee of their authority to inspect and his correlative statutory duty to consent to such inspection. His consent to the search was, accordingly, valid, rather than coerced. Cf. *Davis* v. *United States,* 328 U.S. 582.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
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JULY 1971.

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[6] In *Bumper* two days after the alleged offense (rape) but prior to defendant's arrest, four local law enforcement officers gained entry to the premises in which defendant was residing by announcing to his 66-year-old grandmother (who owned the house) that they had a search warrant, which was not the case. The Court held that there could not be consent in such coercive circumstances. 391 U.S. at 546–551. Contrast *Coolidge* v. *New Hampshire*, No. 323, O.T. 1970, decided June 21, 1971 (opinion of Mr. Justice Stewart at 42–45).

# APPENDIX A

United States Court of Appeals, Tenth Circuit

May Term, 1971

No. 464–70. Filed May 18, 1971.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

LOARN ANTHONY BISWELL, DEFENDANT-APPELLANT

Appeal from the United States District Court for the District of New Mexico

Victor R. Ortega, United States Attorney, and John A. Babington, Assistant United States Attorney, filed a brief for Plaintiff-Appellee.

Warren F. Reynolds, Easley & Reynolds, filed a brief for Defendant-Appellant.

Before CLARK,[1] Associate Justice, HILL and McWILLIAMS, Circuit Judges.

MR. JUSTICE CLARK:

Appellant was indicted on six counts for violating the United States' firearms laws, and was found guilty by a jury on the first count, i.e. dealing in firearms as defined in the Act, 26 U.S.C. § 5845, without having paid the special occupational tax required by 26 U.S.C. § 5801, in violation of 26 U.S.C. §§ 5861 and 5871.

He contends, *inter alia,* that the Act is unconstitutional because it provides for the search of non-public areas of business premises without a search

[1] Associate Justice, United States Supreme Court, Retired, sitting by designation.

warrant. Such a search without a warrant was made of appellant's premises, and guns coming within the terms of the Act were found there. The District Court rejected this contention and sentenced the appellant upon the verdict of guilty on Count One to two years' imprisonment. We find the conviction defective on Fourth Amendment grounds, and, therefore, do not pass upon the other issues raised.

## I

Appellant, a former police officer, had been operating a pawn shop in Hobbs, New Mexico for 12 years. On February 4, 1970, Detective Fowler of the Hobbs Police Department and Special Investigator Hupp of the United States Treasury Department paid a routine visit to appellant's shop. Hupp requested inspection of appellant's gun storerooms, and appellant inquired if Hupp had a search warrant. Hupp said "no" but advised that the Federal Gun Control Act authorized it and showed appellant a copy of the law. 18 U.S.C. § 923(g). Appellant then "said okay" adding "[i]f that is the law, I guess it is all right." Hupp found two sawed off rifles in the gun room which were of the length covered by the Act. The guns had been pawned. Appellant had a federal license for dealing in sporting rifles etc., but had none required by the Act for dealers in gangster-type weapons—sawed off shotguns and rifles, machine guns etc. Nor were the sawed off rifles registered.

Appellant was indicted, as we have said, on six counts. The first was for wilfully and knowingly dealing in firearms as defined by the Act without having paid the special occupational tax required; the second and third for possessing the guns, neither of which were registered; the fourth and fifth for possessing

guns not identified by serial numbers as required by the Act; and the last count was for not maintaining proper records with reference to his guns and ammunition. 18 U.S.C. § 923(g). The sixth count was severed and is awaiting trial.

Prior to trial the appellant moved to suppress the evidence as to the rifles because they were obtained by an illegal search and seizure. In this connection he claimed that the authorization to search under the Act was invalid and that his acquiescence to the search was not voluntary. He also moved to dismiss the first five counts because compliance with the requirements of the Act was violative of appellant's privilege against self-incrimination. Further he attacked the classification of the two single shot rifles as "firearms" under the Act as unreasonable and arbitrary; and finally, that the jury findings were inconsistent and the sentence imposed amounted to cruel and unusual punishment. Since we sustain the first contention, and it disposes of the case, we do not find it necessary to pass upon the other points raised by appellant.

## II

The basic outlines governing the application of the Fourth Amendment's requirement of a warrant and prohibition against unreasonable searches and seizures was discussed rather fully by Mr. Justice White in *Camara* v. *Municipal Court*, 387 U.S. 523, 528–529 (1967). There it was said that the "governing principle * * * except in certain carefully defined classes of cases" was that "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." There a city ordinance gave authorized employees of City departments the right to enter, at reasonable times, any

building, structure etc. in the City to perform any duty imposed upon them by the Municipal Code. The refusal of the occupant to permit the entry was made a criminal offense. The Court found the ordinance defective in not requiring a warrant holding "that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment. * * *" At 534. In a companion case, *See* v. *City of Seattle,* 387 U.S. 541 (1967) this rule was extended to commercial premises. The Court pointed out that it "has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations" (regulatory laws) (at 544) and did not "question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." At 546.

Such an occasion arose three years later in *Colonnade Corp.* v. *United States,* 397 U.S. 72 (1970). There the Court struck down a search made without consent under a federal statutory scheme similar to the one involved here, regarding the federal retail liquor dealer's occupational tax. 26 U.S.C. § 5121(a). The statute, 26 U.S.C. § 5146(b), provided:

> The Secretary or his delegate may enter during business hours the premises * * * of any dealer for the purpose of inspecting or examining any records or documents required to be kept * * * under this chapter. * * *

Section 7606(a) further provided that "The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced or kept, so far as it may be necessary for the purpose of examining said articles or objects." The Court, through Mr. Justice Douglas, said:

**Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. At 77.**

## III

The Federal Gun Control Act has a provision which is almost identical to that involved in *Colonnade, supra.* The Section, 18 U.S.C. § 923(g), provides *inter alia:*

> The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition * * * dealer * * * for the purpose of inspecting or examining (1) any records or documents required to be kept * * * and (2) any firearms or ammunition kept or stored by such * * * dealer. * * *

The government would distinguish *Colonnade* because there the agents used force and broke down a door to enter the liquor storeroom. It argues that here the appellant consented. We cannot agree. The prosecutor puts too much reliance on the appellant's "[i]f that is the law, I guess it is all right." This "consent" is similar to that found ineffective in *Bumper* v. *North Carolina,* 391 U.S. 543 (1968), where Mr. Justice Stewart in writing for the Court said:

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. * * * When a law enforcement officer claims authority to search a home under a warrant, he announces

in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit allowably lawful coercion. Where there is coercion there cannot be consent." At 548–550.

We, therefore, conclude that *Colonnade, See,* and *Bumper, supra,* are conclusive of this issue and we are obliged to hold that the statute insofar as it authorizes entry by the Secretary or his delegate without a warrant and without the owner's permission is unconstitutional, and that the evidence seized thereby must be suppressed. The judgment is, therefore, REVERSED.

# APPENDIX B

## May Term—May 18, 1971

Before Honorable Tom C. Clark, Associate Justice, United States Supreme Court, retired; and Honorable Thomas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges.

No. 464–70

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

LOARN ANTHONY BISWELL, DEFENDANT-APPELLANT

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is reversed.

HOWARD K. PHILLIPS,
*Clerk.*

By HELEN R. BARTHA,
*Deputy Clerk.*

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